

87 - 39

NO.

Supreme Court, U.S.
FILED

JUL 6 1987

CLERK

IN THE

Supreme Court of the United States

TERM, 1987

JAY E. GREGORY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONER

Anthony P. Giorno
Attorney at Law
P.O. Box 1076
Orchard Street
Stuart, VA 24171
(703) 694-3820

Counsel for
Petitioner, Jay
E. Gregory

Irving Gornstein
Attorney at Law
United States Dept.
of Justice
10th & Pennsylvania
Avenue, N.W.
Washington, D.C 20530
(202) 633-2188

Counsel for Respondent,
United States of
America

QUESTIONS PRESENTED FOR REVIEW

- I. WHAT IS THE PROPER STANDARD TO APPLY IN DETERMINING THE SCOPE OF THE GENERAL EXEMPTIONS SET OUT IN TITLE VII, 42 U.S.C. 2000e(f), AND, IN PARTICULAR, THE EXEMPTION FOR "PERSONAL STAFF" OF AN ELECTED OFFICIAL.
- II. WHETHER THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AND THE FOURTH CIRCUIT ERRED IN REQUIRING THE PETITIONER TO SHOW THAT "SWORN OFFICERS" OF THE PATRICK COUNTY SHERIFF'S DEPARTMENT (A) OCCUPY HIGHLY INTIMATE POSITIONS VIS-A-VIS THE SHERIFF AND (B) THAT THEY INFLUENCE THE MAKING OF POLICY TO QUALIFY FOR INCLUSION AS PART OF THE ELECTED SHERIFF'S "PERSONAL STAFF."

PARTIES

The parties to the proceedings are set forth as follows:

Jay E. Gregory, in his official capacity
as Sheriff of Patrick County, Virginia,

Petitioner,

and

United States of America,

Respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES.	ii
TABLE OF CONTENTS.	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE.	4
STATEMENT OF REASONS FOR ALLOWING THE WRIT	10
I. THERE EXISTS CLEAR DISPARITY AMONG THE CIRCUITS WHICH HAVE CONSIDERED THIS ISSUE AS TO WHAT STANDARD DETERMINES WHETHER AN INDIVIDUAL OR POSITION IS INCLUDED WITHIN THE GENERAL EXEMPTIONS, SET FORTH IN TITLE VII, 42 U.S.C. §2000e(f) AND, IN PARTICULAR, THE EXEMPTION FOR "PERSONAL STAFF" OF AN ELECTED OFFICIAL. . .	10
II. THE FOURTH CIRCUIT AND THE UNITED STATES DISTRICT COURT DECISIONS REQUIRING THAT AN ELECTED OFFICIAL DEMONSTRATE THAT HIS RELATIONSHIP TO AN INDIVIDUAL APPOINTEE IS SO CLOSE AS TO ENGENDER A "HIGHLY INTIMATE RELATIONSHIP WHICH INFLUENCES THE MAKING OF POLICY" IN ORDER FOR THAT INDIVIDUAL TO BE CONSIDERED	

AS PART OF THE "PERSONAL STAFF" OF THE ELECTED OFFICIAL IS SUCH A DEPARTURE FROM THE STATUTE AND PRIOR CASE LAW AS TO REQUIRE INTERVENTION BY THIS COURT	10
ARGUMENT	11
I.	11
II.	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:

<u>Calderon v. Martin County,</u> 639 F.2d 271 (5th Cir. 1981) . . .	15
<u>Clark v. Tarrant County,</u> 798 F.2d 738 (5th Cir. 1986) . . .	15
<u>Curl v. Reavis,</u> 740 F.2d 1323 (4th Cir. 1984). . .	16
<u>Gearhart v. Oregon,</u> 410 F.Supp. 597 (D.Ore. 1976). . .	15, 17, 18
410 F.Supp. at 600	18
<u>Howard v. Ward County,</u> 418 F.Supp. 494 (D.N.D. 1976). . .	12
418 F.Supp. at 502	12
<u>Kyles v. Calcasieu Parish Sheriff's Department,</u> 395 F.Supp. 1307 (W.D.La. 1975). .	12
395 F.Supp. at 1310	13
<u>Owens v. Rush,</u> 654 F.2d 1370 (10th Cir. 1981) . .	16
<u>Ramirez v. San Mateo County,</u> 639 F.2d 509, 513 (9th Cir. 1981). .	14
<u>Teneyuca v. Bexar County,</u> 767 F.2d 148 (5th Cir. 1985) . . .	15
<u>United States v. Gregory,</u> 582 F.Supp. 1319 (W.D.Va. 1984). .	1

<u>United States v. Gregory,</u>	
No. 84-1613 (4th Cir. Oct. 1, 1985).	2
No. 83-0094-0 (W.D.Va. July 18, 1986).	2
slip. op. at 6-7	8
No. 86-3121 (4th Cir. May 19, 1987).	2
slip. op. at 9	10
<u>Wall v. Coleman,</u>	
393 F.Supp. 826 (N.D. Ga. 1975).	14
393 F.Supp. at 830-31.	14
<u>Wilson v. Kelly,</u>	
294 F.Supp. 1005 (N.D.Ga. 1968).	13, 14
Miscellaneous:	
Title VII, 42 U.S.C. §2000e(f)	<u>Passim</u>
Constitution of Virginia, Article VII, §4.	5
1950 Code of Virginia:	
§15.1-48	5
§14.1-70, as amended	6
§14.1-73.1:2, as amended	6
§28 U.S.C. 1254(1)	3

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERM, 1987

JAY E. GREGORY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ of Certiorari
to the United States Court of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The first decision in connection with this litigation was rendered by the United States District Court for the Western District of Virginia on March 23, 1984. It is reported as United States v. Gregory, 582 F.Supp. 1319 (W.D.Va. 1984). The Fourth Circuit remanded that case to the district court for reconsideration by Memorandum Opinion

dated October 1, 1985. United States v. Gregory, No. 84-1613 (4th Cir. Oct. 1, 1985). A copy of that opinion is attached as Appendix "A" to this petition. The district court, on remand, issued its second decision on July 18, 1986. United States v. Gregory, No. 83-0094-D (W.D.Va. July 18, 1986). Copies of the district court order and opinion in that case appear as Appendix "B" to this petition. The Fourth Circuit subsequently reversed the district court's conclusion that road deputies in Patrick County are part of the Sheriff's "personal staff" and affirmed the district court's finding that the remaining sworn officers are "employees" for purposes of Title VII. That decision, which is the subject of this appeal, is cited as United States v. Gregory, No. 86-3121 (4th Cir. May 19, 1987), and appears as attachment "C" to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1987. This petition is filed within 90 days thereof. The jurisdiction of this Court is invoked pursuant to §28 U.S.C. 1254(1).

STATUTE INVOLVED

The following section of Title VII is involved in this case: 42 U.S.C. §2000e(f), which defines the term "employee" as . . .

An individual employed by an employer, except that the term employee shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on a policy making level, or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

STATEMENT OF THE CASE

The United States initially brought this action on June 29, 1983, against the Sheriff of Patrick County, alleging that the Sheriff engaged in and continued to engage in employment practices that discriminate against women in positions of "sworn officers" (hereinafter "deputies"). After a three-day hearing, the district court made certain findings concerning the factual and legal relationship of the Sheriff of Patrick County and his deputies including: (1) Patrick County is a rural county located in southwest Virginia, with a population of approximately 17,000, and a size geographically of 469 square miles. (2) The Patrick County Sheriff's Department had, at the time the case was brought, a full time staff of 22 persons, 18

of whom are designated as "sworn officers" or deputies. Fifteen of his deputies were male, with two being assigned as supervisors, two as investigators, four as road deputies, two as courtroom security officers, and five as correctional officers. Of the female deputies, one was assigned as a civil process server, and two were assigned as clerk steno/matrons. (3) The Sheriff of Patrick County, Virginia, is a constitutional officer elected by the citizens of the county which he serves. Constitution of Virginia, Article VII, §4. (4) Deputies in Virginia are appointed by the sheriff, and the terms of the deputies end with that of the sheriff; deputies may discharge any of the official duties of the sheriff during the sheriff's continuance in office. §15.1-48 of the 1950 Code of Virginia. (5) Sheriff's deputies in

Virginia have no civil service protection, and serve at the pleasure of the sheriff.

(6) While the number and salaries of full time deputies appointed by the sheriff are fixed by the Virginia State Compensation Board, \$14.1-70 and \$14.1-73.1:2 of the 1950 Code of Virginia, as amended, the selection of individuals to serve as deputies is wholly within the discretion of the sheriff. (7)

There is a high degree of accountability between the Sheriff of Patrick County and his deputies, who are the eyes and ears of the Sheriff as to public sentiment and opinion. (8)

Such accountability equates in a rural area such as Patrick County with the confidential relationship of the deputies employment. (9) Deputies in Patrick County are viewed as the Sheriff himself in the deputies' assigned area of the county. (10) Because of the political realities of life in rural

counties in general, and Patrick County in particular, deputies stand for re-election as does the Sheriff himself.

Based on the foregoing, the district court initially concluded that the choice of deputies by the Sheriff in Patrick County directly affected his ability to discharge his duties and continue to be re-elected to office. The close, almost symbiotic relationship of the Sheriff to his deputies led the court to hold that deputies are part of the Sheriff's "personal staff", and thus exempt from coverage under Title VII.

On remand, after restating the legal relationship of the Sheriff to his deputies, Judge Kiser re-examined the factual relationship between the Sheriff and each position within the department. After doing so, the court affirmed its earlier opinion that "road deputies" are part of the "personal

staff" of the Sheriff, and are, therefore, exempt from Title VII coverage.

It is the road deputy who is the alter ego and personification of the sheriff in the geographical area to which he is assigned. These deputies are assigned to a specific area of the county. They live in the area and become an extension of the sheriff. It is with them that most of the residents of the their geographically assigned area have contact. They are the eyes and ears of the sheriff, not only for matters which fall within their official sphere but also to matters political. For these reasons and the reasons assigned in my earlier holding, I continue to be of the opinion that road deputies fall within the personal staff exemption.

United States v. Gregory, No. 83-0094-D, slip op. at 6-7 (W.D.Va. July 18, 1986).

Upon reconsideration of the remaining positions, however, the court concluded that correctional officers and courtroom security officers fell outside the scope of the "personal staff" exemption. Those positions, in the opinion of the district court, are neither "highly intimate" nor are they policy making

positions. Thus, the failure of the Sheriff to show that correctional officers and courtroom security officers made policy for the Patrick County Sheriff's Department automatically excluded them from consideration as the Sheriff's "personal staff."

The underlying analysis, used by the district court on the issue of the "personal staff" exemption was accepted by the Fourth Circuit Court of Appeals which, while affirming the district court as to the position of the correctional officers and courtroom security officers, reversed the district court and excluded the position of road deputy from the "personal staff" exemption. The Fourth Circuit opined that the failure of the Sheriff to establish that the relationship between road deputies and the Sheriff "engenders a highly intimate relationship which influences the making

of policy", United States v. Gregory,
No. 86-3121, slip op. at 9 (4th Cir.
May 19, 1987), required that court to
conclude that road deputies were
"employees" for purposes of Title VII.

STATEMENT OF REASONS FOR ALLOWING THE WRIT

- I. THERE EXISTS CLEAR DISPARITY AMONG THE CIRCUITS WHICH HAVE CONSIDERED THIS ISSUE AS TO WHAT STANDARD DETERMINES WHETHER AN INDIVIDUAL OR POSITION IS INCLUDED WITHIN THE GENERAL EXEMPTIONS, SET FORTH IN TITLE VII, 42 U.S.C. §2000e(f) AND, IN PARTICULAR, THE EXEMPTION FOR "PERSONAL STAFF" OF AN ELECTED OFFICIAL.
- II. THE FOURTH CIRCUIT AND THE UNITED STATES DISTRICT COURT DECISIONS REQUIRING THAT AN ELECTED OFFICIAL DEMONSTRATE THAT HIS RELATIONSHIP TO AN INDIVIDUAL APPOINTEE IS SO CLOSE AS TO ENGENDER A "HIGHLY INTIMATE RELATIONSHIP WHICH INFLUENCES THE MAKING OF POLICY" IN ORDER FOR THAT INDIVIDUAL TO BE CONSIDERED AS PART OF THE "PERSONAL STAFF" OF THE ELECTED OFFICIAL IS SUCH A DEPARTURE FROM THE STATUTE AND PRIOR CASE LAW AS TO REQUIRE INTERVENTION BY THIS COURT.

ARGUMENT

I. THERE EXISTS CLEAR DISPARITY AMONG THE CIRCUITS WHICH HAVE CONSIDERED THIS ISSUE AS TO WHAT STANDARD DETERMINES WHETHER AN INDIVIDUAL OR POSITION IS INCLUDED WITHIN THE GENERAL EXEMPTIONS, SET FORTH IN TITLE VII, 42 U.S.C. §2000e(f) AND, IN PARTICULAR, THE EXEMPTION FOR "PERSONAL STAFF" OF AN ELECTED OFFICIAL.

42 U.S.C. §2000e(f) exempts elected officials, and certain classes of their appointees from coverage under Title VII, by providing that the term "employee"

. . . shall not include any person elected to public in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level, or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.
. . .

42 U.S.C. §2000e(f) (emphasis added)

The dilemma of those courts which have grappled with defining the scope

of these exemptions is best stated by Judge Van Sickle in Howard v. Ward County, 418 F.Supp. 494 (D.N.D.1976):

This definition (of the term "employee" and the exemptions thereto) is an outstanding example of bad draftsmanship

418 F.Supp at 502.

Those federal court decisions attempting to define the parameters of those exemptions, particularly those dealing with the "personal staff" exemption, are consistent only in their lack of consistency. The earlier cases such as Kyles v. Calcasieu Parish Sheriff's Department, 395 F.Supp. 1307 (W.D.La. 1975) appear to rely exclusively on state law in determining whether an individual is exempt from Title VII coverage. In Kyles, Judge Scott analyzed the legal and factual relationship of the sheriff to his deputies under Louisiana law and concluded

[I]t is clear that under the applicable Louisiana law and the facts of this case, plaintiff was not an "employee" of the Calcasieu Parish Sheriff's Office. The relationship is much more personal; it is an appointor-appointee relationship. There is no such person as a career deputy because the deputy is appointed to fill a term of four years or less to coincide with the term of the appointing sheriff. He has and can earn no right to or prospect of promotion or reappointment. He is not subject to civil service. No contractual rights are involved. The deputy is not an employee but is, rather, an appointee.

395 F.Supp. at 1310.

Citing Wilson v. Kelly, 294 F.Supp. 1005 (N.D.Ga. 1968), the Kyles court assigned great significance to the role of politics in making the determination that a deputy is exempt from Title VII coverage as part of the "personal staff" of the elected official.

In the elective-appointive area, however, the process is entirely political. Each elected official must rise and fall on his performance and that of his appointed assistants. The courts would not presume to

tell the President, or Governor, a Senator or Congressman that there are limitations on his cabinet or staff appointments. Similarly, other elected officials (such as the Sheriffs here) have freedom to choose such subordinates.

Ibid.

Other cases which seem to rely entirely on state law in determining the scope of the §2000e(f) exemptions include Wall v. Coleman, 393 F.Supp. 826 (N.D.Ga. 1975), citing Georgia law to exclude an assistant district attorney from Title VII coverage as part of the "personal staff" of the elected district attorney. Again, the court in that case emphasized the role of politics in deciding the applicability of the §2000e(f) exemptions. See, 393 F.Supp. at 830-31. Subsequently, the Ninth Circuit in Ramirez v. San Mateo County, 639 F.2d 509, 513 (9th Cir. 1981) apparently adopted the rationale of the Georgia court in Wall in relying

entirely on State law to define the scope of the "personal staff" exemption. See also, Gearhart v. Oregon, 410 F.Supp. 597 (D.Ore. 1976) (citing Oregon law to hold that deputy legislative counsel is not an immediate adviser of state legislator with respect to exercise of the legislators' constitutional or legal powers).

Other circuits, however, have held that the applicability of the §2000e(f) exemptions is a question of federal law, with state law being relevant only insofar as it describes and defines the duties of the position vis-a-vis the elected official. Those courts adopting this rationale include the Fifth Circuit, Calderon v. Martin County, 639 F.2d 271 (5th Cir. 1981), Teneyuca v. Bexar County, 767 F.2d 148 (5th Cir. 1985), Clark v. Tarrant County, 798 F.2d 738 (5th Cir. 1986), the Tenth

Circuit, Owens v. Rush, 654 F.2d 1370 (10th Cir. 1981), and the Fourth Circuit, Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984).

This obvious conflict and confusion among the circuits presents a situation which requires clarification of an important point of federal law by this Court.

II. THE FOURTH CIRCUIT AND THE UNITED STATES DISTRICT COURT DECISIONS REQUIRING THAT AN ELECTED OFFICIAL DEMONSTRATE THAT HIS RELATIONSHIP TO AN INDIVIDUAL APPOINTEE IS SO CLOSE AS TO ENGENDER A "HIGHLY INTIMATE RELATIONSHIP WHICH INFLUENCES THE MAKING OF POLICY" IN ORDER FOR THAT INDIVIDUAL TO BE CONSIDERED AS PART OF THE "PERSONAL STAFF" OF THE ELECTED OFFICIAL IS SUCH A DEPARTURE FROM THE STATUTE AND PRIOR CASE LAW AS TO REQUIRE INTERVENTION BY THIS COURT.

In addition to the obvious conflict and confusion among the circuits, the decisions below, to the extent that they required the Petitioner to

demonstrate the existence of a highly intimate relationship between the Sheriff and his deputies, and that the deputies influenced the Sheriff's policy to be considered as part of the Sheriff's "personal staff, went well beyond the scope of any prior decisions on this issue. Neither the antecedent Fourth Circuit opinions nor those of any other circuit served as a harbinger of the imposition of such requirements. Petitioner submits that the decision of the Fourth Circuit requiring such a showing was a clear and radical departure from precedent and was erroneous.

The Fourth Circuit and district court opinions are also contradictory to legislative intent in drafting §2000e(f). In Gearhart, Judge Burns analyzed the legislative history of the statute and identified four separate

and distinct exemptions under §2000e(f) from the term "employee": (a) the elected official himself, (b) a person chosen by such official to be part of his personal staff; (c) an appointee on a policy making level; (d) an official's immediate advisor with respect to the exercise of the constitutional and legal powers of the office. 410 F.Supp. at 600. The Fourth Circuit in Curl, also recognized that the exemption for "personal staff" of elected officials exists separate and apart from the exemptions for policy making appointees and immediate advisors. Yet that separation, which is based on the fact that the exemptions set forth in 42 U.S.C. §2000e(f) are written in the disjunctive, has been abandoned by the decision which is the subject of this appeal. No other federal decision has strayed so far in interpreting the

\$2000e(f) exemptions. Further, such an interpretation is clearly inconsistent with legislative intent in drafting the exemptions and is, therefore, erroneous as a matter of law.

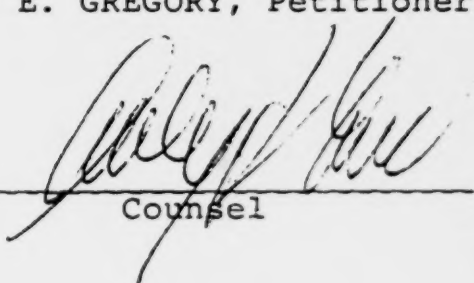
CONCLUSION

For the foregoing reasons, the Petitioner prays that a writ of certiorari be granted.

Respectfully Submitted,

JAY E. GREGORY, Petitioner

By



Counsel

Anthony P. Giorno
Attorney at Law
Post Office Box 1076
Orchard Street
Stuart, Virginia 24171
(703) 694-3820



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1613

Jessica Dunsay Silver (John P. Alderman, United States Attorney; Wimmial Bradford Reynolds, Assistant Attorney General on brief) for Appellant; Anthony P. Giorno (Jay E. Gregory on brief) for Appellee.

CHAPMAN, Circuit Judge:

The United States brought this appeal from the district court's dismissal of its action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Section 2000e et seq., against Jesse W. Williams in his official capacity as the sheriff of Patrick County, Virginia. The United States alleged that the sheriff of Patrick County had engaged and continued to engage in employment practices that discriminated against women and deprived them of employment as deputies in the Sheriff's Department. After a bench trial, the district court held that the sheriff's deputies in Patrick County were not "employees" within the meaning of Title VII and dismissed the action. The United States then appealed. We remand this action to the district court

with instructions to make additional findings of fact and to reconsider its decision in light of our decision in Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984), decided after the district court had filed its memorandum opinion and before oral argument in this appeal was heard.

Sheriff Williams was elected in November 1979 and assumed office on January 1, 1980. He served until January 1984, when Jay Gregory assumed the office as a result of defeating Sheriff Williams in the November 1983 election. The new sheriff was substituted as defendant in this action upon motion of the United States pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

The district court made the following findings of fact. Patrick

County is a rural county located in southwest Virginia. The population of the county was approximately 17,000, and its size geographically is approximately 470 square miles. The Patrick County Sheriff's Department has a full-time staff of twenty-two persons, eighteen of whom are designated as "sworn officers" or deputies. Under Sheriff Williams fifteen of the sworn officers were male, with two being assigned as supervisors, two as investigators, four as road deputies, two as court security deputies, and five as correctional officers. One female was assigned as civil process server and two are assigned as clerk-steno/matrons.

On July 30, 1980, Doris Scales filed a charge of sex discrimination with the Equal Employment Opportunity Commission. She alleged that Sheriff

Williams unlawfully refused to hire her in May 1980 as a deputy on the basis of her sex. This charge eventually resulted in the filing of this law suit by the United States.

After his factual findings the district court reviewed the Virginia statutory and case law on the relationship between a sheriff and his deputy sheriff and federal law on the definition of an employee and the exceptions to that definition. See 42 U.S.C. Section 2000e(f). The district court concluded that deputy sheriffs in Patrick County were part of the personal staff of the sheriff. As such the deputy sheriffs were not employees under the statutory language of Title VII. Accordingly, the district court dismissed the action.

On August 1, 1984, the Fourth Circuit decided Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984). In Curl we considered the same issue as it relates to deputy sheriffs in North Carolina. We held that we could not conclude that Curl was a member of the sheriff's personal staff and, accordingly, found that he was an employee with the statutory language of Title VII.

The district court filed its opinion on March 23, 1984, before we decided Curl. In its appeal of this action the United States relies on Curl and requests that we reverse the district court because of it. Curl, however, considered this issue under the factual surroundings of the North Carolina sheriffs and deputy sheriffs. This action involves Virginia sheriffs and deputy sheriffs.

Because of this difference and because the district court filed its opinion before Curl, we find it necessary to remand this case to the district court to reconsider its order. The district court should make appropriate findings of fact and review its conclusions of law in light of Curl. Accordingly, this action is

REMANDED WITH INSTRUCTIONS.



Appendix "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	Civil Action
)	# 83-0094-D
v.)	
)	<u>ORDER</u>
JAY GREGORY, SHERIFF OF)	
PATRICK COUNTY,)	
)	
Defendant)	

In accordance with the Memorandum
Opinion filed contemporaneously
herewith, it is hereby ORDERED that:

1. All claims of sex
discrimination against the Sheriff of
Patrick County are DENIED, except for
the filling of the position of
deputy/courtroom security for which Ms.
Ressell applied.

2. Sheriff Gregory, in his
official capacity, is hereby ORDERED to
pay over to the United States \$6,532.68

for the use and benefit of Ms. Ressel.

3. The request of the United States to be awarded reasonable attorneys' fees is DENIED, and the parties shall bear their respective court costs.

4. The Clerk is directed to dismiss this case from the active docket of this Court.

5. The Clerk is further directed to send a certified copy of this Order to all counsel of record.

ENTER this 18th day of July, 1986.

/s/ Jackson L. Kiser
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	Civil Action
)	# 83-0094-D
v.)	
)	<u>MEMORANDUM</u>
JAY GREGORY, SHERIFF OF)	<u>OPINION</u>
PATRICK COUNTY,)	
)	
Defendant)	

By: Jackson L. Kiser, Judge
United States District Court

This case is a sex discrimination case which is back in this Court on remand from the Fourth Circuit Court of Appeals. The United States brought these charges of sex discrimination against the Sheriff of Patrick County because of his hiring practices.

On March 23, 1984, this Court dismissed this case, holding that the deputy sheriffs of the Patrick County Sheriff's Department came within the personal staff exemption of 42 U.S.C.

Section 2000e(f). The United States appealed the decision and while the case was on appeal, the United States Court of Appeals for the Fourth Circuit decided the case of Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984). Because Curl dealt with the same issue, the Fourth Circuit remanded this case to this Court to reconsider its decision in light of the Curl decision.

I delayed further consideration of this case until the Fourth Circuit decided the case of Brewster v. Barnes, et al, No. 83-1572, slip op. (4th Cir. April 10, 1986), which also involved an issue of the personal staff exemption. After the Fourth Circuit handed down its decision in the Brewster case, I received briefs from counsel, and on May 15, 1986, the case was reargued and the issues are now ripe for decision.

Detailed findings of fact appear in my Memorandum Opinion of May 23, 1984, and I will here repeat only those facts which are necessary for comparative purposes with the Curl and Brewster opinions. To put these facts in their proper perspective, it is necessary to review the factual and legal basis of the Curl and Brewster decisions and the posture of those cases as they were presented to the Fourth Circuit on appeal.

Curl was an appeal from the United States District Court for the Western District of North Carolina, which had found that the Defendant, Leroy Reavis, Sheriff of Iredell County, North Carolina, had discriminated against the plaintiff on the basis of her sex in violation of Title VII. The district court's findings of fact disclosed the

following: Curl was hired in July of 1976 by Reavis' predecessor. She was hired as a deputy sheriff and served as a dispatcher/matron and as a records clerk. Defendant Reavis was elected Sheriff in 1978, and a month after his election, he transferred Curl to the position of secretary of the Detective Division with no change in pay status. A position of road deputy came open in June, 1980, and Curl applied for it. She was denied the position by the Sheriff's Chief Deputy and was told that a woman could not fill that job. Subsequently, she applied for the job of detective and was denied that. Ultimately, on April 13, 1981, Curl was fired by the Chief Deputy.

In North Carolina, the Sheriff is an elected official, and he has the authority to hire and fire his deputies

and other employees. All of his employees serve at will. Reavis asserted in the district court, as he did in the circuit court, that Curl came within the personal staff exception of 42 U.S.C. Section 2000e(f). The district court found that she did not, and the Fourth Circuit agreed. The court found her duties to be routine. In so finding, the court stated that there was no evidence that her position was "highly intimate and sensitive" nor was she under the personal direction and supervision of the Sheriff. 740 F.2d at 1328. See also Owens v. Rush, 654 F.2d 1370, 1375 (10th Cir. 1981).

The Fourth Circuit in Curl set out the legal principles which guided its determination. The court stated that plaintiff's status as an employee under Title VII was a question of federal law,

but that state law was relevant in defining and describing the plaintiff's position, her duties, and the way she was hired, supervised, and fired. The court further pointed out that the personal staff exemption was to be narrowly construed. It then proceeded to analyze Curl's positions of dispatcher/matron and secretary and found that these duties did not place her in the personal staff category. It is noteworthy that the Fourth Circuit did not undertake to analyze the positions of patrol deputy, supervisor, or detective because such analysis was not necessary to determine whether Curl had been discriminated against when she had been fired from the position of secretary. The Fourth Circuit specifically disclaimed any intent to enunciate a broad sweeping rule that

applied to all deputy sheriffs. In so doing, it stated, "We are unwilling to treat all deputy sheriffs as employees, or to exclude them wholesale from Title VII's protection." 740 F.2d at 1328.

The Brewster case, supra, does not expand or contract the legal analysis of Curl. It does, however, make clear that there is "no significant difference between the legal relationship of sheriffs and deputies in North Carolina . . . and in Virginia" Brewster, slip op. at 12. It also reemphasizes that the broad issue of whether or not all deputy sheriffs are on the sheriff's "personal staff" is to be determined on a case-by-case basis requiring "a careful examination of the nature and circumstances of [the plaintiff's] role in the sheriff's department." Id. at 11-12, quoting Curl, 740 F.2d at 1328.

Factually, Brewster and Curl are very similar in that the positions which the Fourth Circuit analyzed were those of deputy sheriff/matron. In both instances, the court found that the job of matron was not one of an intimate or high level position nor was it involved in policy decisions. In both cases, the position was found to be that of a routine correctional officer at the jail.

In my Memorandum Opinion of March 23, 1984, I noted that the question of whether a deputy sheriff fell within the personal staff exemption was a question of federal law, but that state law was pertinent in defining the job duty and the deputy's legal relationship to the sheriff. I further noted that the personal staff exemption was to be narrowly construed. These are the same

standards enunciated in Curl and Brewster. Indeed, during the oral arguments on May 15, I pressed both counsel for the United States and counsel for the Defendant to point out where the legal framework used by this Court in analyzing the personal staff exemption differed from the legal framework used by the Fourth Circuit in Curl and Brewster. They could not.

Both Curl and Brewster make clear that the determination of whether a position on the sheriff's staff falls within the personal staff exemption must be made on a case-by-case basis. In conducting such an analysis, both the legal relationship and the actual (factual) relationship of the sheriff to the particular position and person who occupies it is critical to the analysis. The legal relationship of the sheriff to

his deputies need not be repeated here. It was analyzed in depth in my earlier decision and was fully discussed by the Fourth Circuit in Curl and Brewster. It is the actual relationship of the sheriff to the deputy that needs reexamination under the Fourth Circuit's mandate. That is the task to which I now turn.

The demographics of Patrick County are set forth in my March 23, 1984, Memorandum Opinion and will not be recounted in detail here. Suffice it to say that Patrick County is a sparsely populated, rural county with a relatively large land area. The Sheriff's Department for the period in question, i.e., January 1, 1980, to January 1, 1984, consisted of twenty-three persons including the sheriff.

Of the twenty-two persons who worked for the sheriff, eighteen were "sworn officers" or deputies, but all deputies do not have the same job assignment. The deputy classification includes four road deputies, two investigators, two supervisors, two court security officers, five correctional officers, one process server, and two clerk-steno matrons. The job classifications are important in determining whether a position falls within the personal staff exemption.

I am of the opinion that the four road deputies fall within the personal staff exemption, but some of the other jobs do not. It is the road deputy who is the alter-ego and personification of the sheriff in the geographical area to which he is assigned. These deputies are assigned a specific area of the

county. They live in the area and become an extension of the sheriff. It is with them that most of the residents of their geographically-assigned area have contact. They are the eyes and ears of the sheriff, not only for matters which fall within their official sphere but also as to matters political. For these reasons and the reasons assigned in my earlier holding, I continue to be of the opinion that the road deputies fall within the personal staff exemption. This affects not only them, however, because the job of supervisor and investigator are not entry level positions, but are those which require prior experience as a road deputy. Cf. Curl, 740 F.2d at 1326 and 1329.

Upon reconsideration of the remaining positions, I have concluded

they are not within the personal staff exemption. The position of correctional officer, as pointed out in Curl and Brewster, is not a highly intimate and sensitive position nor is it a policymaking position. The job calls for routine activity in conjunction with the handling of prisoners in the jail. However, the position of correctional officer in the Patrick County Jail was not one which could be occupied by a female. The requirement that the correctional officer be a male was interposed by the Defendant as being a bona fide occupational qualification, and I think that defense was clearly established by the evidence.

The evidence showed that female prisoners were not housed in the Patrick County Jail because the occasion for housing a female prisoner arose so

seldom. Thus, the correctional officers in the Patrick County Jail had an entirely male population with which to deal. The evidence revealed that in dealing with the prisoners the officer was often called upon to conduct a strip search, to assist with medical problems and hygiene needs, to respond to disturbances, to surveil the prisoners, and to conduct regular inspections of the cells and the prisoners. The United States suggests that some of these duties which involved the observation of prisoners could be conducted by a T.V. monitor. This is probably true, but it lacks the effectiveness of the personal on-sight inspection and does not fulfill the other duties which require personal contact with the prisoners. To have a female perform many of the duties which require personal and intimate contact

with male prisoners would, in my opinion, be embarrassing to the officer and to the prisoners as well. Not only would such contact be embarrassing, it is fraught with the danger of creating disturbances among the prisoners and probably would lead to violence in some instances.

With the exception of the position of courtroom security deputy, the remaining positions of process server¹ and clerk-steno/matron were performed by females and, therefore, there can be no claim of sex discrimination in the filling of those positions. Thus, the sole remaining position to consider is that of courtroom security deputy.² The only time Sheriff Williams, Gregory's predecessor, had occasion to fill the position of deputy/courtroom security officer during his tenure was in July of

1983. The manning roster shows that he filled two such positions on January 1, 1980, but these were carry-over positions from the prior sheriff's administration. The manning roster also shows that the persons occupying these positions were carried over to Sheriff Gregory's administration commencing January 1, 1984.³

The courtroom security position which was filled on July 1, 1983, was the one for which Stephanie Ressel had applied on June 3, 1983. Sheriff Williams filled the position with a man, David Morris. At trial, Williams testified that the reason he did not choose Ms. Ressel was that she was over qualified for the position. (She had a bachelors degree in criminal science). He felt that she would become dissatisfied in the job and leave in a

short period of time. Ms. Ressel testified that she was never given any reason why she was rejected, but only received a form letter advising her that she had not been chosen.

The explanation that Sheriff Williams gave for rejecting Ms. Ressel is weak to say the least. His explanation would carry a great deal more weight had he advised Ms. Ressel at the time of her interview that he felt she was overqualified. Instead of doing that, Sheriff Williams went into some detail regarding the duties of the office, having to live in Patrick County, and the requirements of procuring uniforms and equipment. Moreover, when Mr. Morris' qualifications are compared with those of Ms. Ressel, it is clear that she has the edge. Unlike Ms. Ressel, Morris had

no formal education in law enforcement. Ms. Ressel had prior experience in law enforcement as an intern with the Harrisonburg Police Department and Morris had none. On the written examination given by Sheriff Williams, Ressel had a score of 86%, and Morris received 71%.

I think there is sufficient evidence to support a finding of sex discrimination by Sheriff Williams in choosing Mr. Morris over Ms. Ressel for the position of courtroom deputy. However, I do not feel that the United States is entitled to injunctive relief on behalf of Ms. Ressel. Ms. Ressel testified as of April 1, 1981, that she was no longer interested in a job with the Patrick County Sheriff's Department.⁴ Thus, she does not desire injunctive relief, but she is entitled

to monetary damages to the extent of lost wages.

Ressel's lost wages are computed in Appendix A to Plaintiff's post-trial brief filed February 7, 1984. The computation shows her lost earnings for the period of July 1, 1980 to March 31, 1981, to be \$6,532.68 plus interest. This does not, however, take into account the fact that Ms. Ressel was employed in her husband's business from January 1, 1981, until March 31, 1981. Although she was not paid a wage by her husband, she did receive indirect benefits to the extent the business benefited from her services. I am, therefore, going to order that Sheriff Gregory, the present occupant of the Sheriff's Office, pay over to the United States the amount of \$6,532.68, but I am not going to require the payment of

interest on that amount because of Ms. Ressel's employment by her husband from January 1, 1982, until March 31, 1981.⁵

The Defendant moved to dismiss the Complaint under Fed.R.Civ.P. 19 because of the United States' Failure to include indispensable parties. Defendant asserted in the motion that the Patrick County Board of Supervisors and the Virginia State Compensation Commission should have been joined as parties. The United States opposed the motion. Although it may have been desirable to join the Board of Supervisors and the Compensation Commission because ultimately one or both of these bodies will probably have to provide funds for the payment of the monetary relief, I don't believe it was fatal to the United States' case to fail to do so. It is clear that the Sheriff is fully

responsible for the operation of his office and is the hiring and firing authority of all of his employees.⁶ It is also clear that the position of deputy/court security officer had been authorized by the Compensation Commission. Moreover, there is no challenge by the Defendant that the Sheriff was acting in his official capacity in filling that job. Thus, under the auspices of Brandon v. Holt, 469 U.S. _____, 105 S. Ct. _____, 83 L.Ed. 878 (1985) and Kentucky v. Graham, 473 U.S. _____, 105 S. Ct. _____, 87 L.Ed.2d 114 (1985), judgment against the Sheriff in his official capacity is tantamount to judgment against the political entity.

The remaining relief requested by the United States is that of attorneys' fees. I will deny that relief because I

am of the opinion that the Defendant substantially prevailed in this case. It was the United States' thesis that a pervasive violation of Title VII was ongoing in the Patrick County Sheriff's Office and that at least two females other than Ms. Ressel had been victims of it. The gravamen of the relief sought by the United States was an injunction, and in addition thereto compensation for the aggrieved females. It succeeded only in obtaining relief for one female for back wages for a short period of time. Thus, the Defendant, not the United States, must be considered the prevailing party in the case. An Order will be entered in conformity with the foregoing conclusions.

The Clerk is directed to send a certified copy of this Memorandum

Opinion to all counsel of record.

/s/ Jackson L. Kiser
United States District Judge

¹The position of process server was abolished by Sheriff Gregory. As noted in the March 23, 1984, Memorandum Opinion, this position was filled by a female during Sheriff Williams tenure. When Sheriff Gregory assumed office in 1984, the position was abolished because of budgetary constraints. Although the United States urges that Sheriff Gregory had the ulterior motive of sex discrimination in abolishing this position, the evidence does not justify such a conclusion.

²Another position in the Sheriff's Department was that of dispatcher. The dispatcher was not a sworn deputy, and that position was filled by both males and females. The United States does not claim any discrimination in the filling of this position.

³See Post-trial Brief for United States at 17-18 (November 6, 1985).

⁴The present Sheriff is Jay Gregory, who took office on January 1, 1984. There is no evidence that he in any way invidiously discriminated against women and, therefore, injunctive relief would be inappropriate regardless of Ms. Ressel's personal desires. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Spomer v. Littleton, 414 U. S. 514 (1974).

⁵The United States sued the Sheriff only in his official capacity. The United States pointedly disclaimed any attempt on its part to impose personal liability upon either Sheriff Williams or Sheriff Gregory. Consequently, the monetary relief here ordered must come from official sources.

⁶The sheriff of a county is a constitutional officer elected by the voters and is responsible for the operation of his office. Va. Const. art. VII, Section 4.



Appendix "C"
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 86-3121

United States of America,
Plaintiff - Appellant,
versus
Jay Gregory, Sheriff of Patrick County,
Defendant - Appellee.

No. 86-3122

United States of America,
Plaintiff - Appellee,
versus
Jay Gregory, Sheriff of Patrick County,
Defendant - Appellant.

Appeal from the United States District
Court for the Western District of
Virginia, at Danville. Jackson L.
Kiser, District Judge. (CA-83-94)

Argued: March 2, 1987
Decided: May 19, 1987

Before HALL, and CHAPMAN Circuit Judges
and TIMBERS, Senior Circuit Judge for
the Second Circuit, United States Court
of Appeals, sitting by designation.

Irving Gornstein, Department of Justice
(William Bradford Reynolds, Assistant
Attorney General; Jessica Dunsay Silver,
Department of Justice on brief) for
Appellant; Anthony Paul Giorno, County
Attorney for the County of Patrick,
Virginia for Appellee.

CHAPMAN, Circuit Judge:

The Sheriff of Patrick County, who is the appellee in this case, and his predecessor have failed to employ women in certain deputy positions. The district court held that the positions of road deputy, investigator deputy and supervisor deputy in this rural county are within the "personal staff" of the sheriff, thus exempting such positions from the coverage of Title VII. The district court also found that the sheriff's express prohibition against the employment of female officers within Patrick County's all-male jail was justified as a bona fide occupational qualification. We reverse both determinations, holding that the narrow exception to Title VII for personal staff does not encompass these road deputy positions, and that the appellee

has failed to prove that the county could not have feasibly made the employment of female correctional officers possible through reasonable modification of the prison facility and job functions.

I.

Patrick County is a sparsely populated, rural county, with a relatively large land area. The sheriff is elected, and his department consists of twenty-three individuals, including "sworn officers" or deputies. The deputy classification includes four road deputies, two investigators, two supervisors, two court security officers, five correctional officers, one process server, and two "clerk-steno" matrons. The sheriff at the time that most of the alleged discriminatory incidents occurred was

Sheriff Williams, who was defeated at election by Sheriff Gregory, the substituted defendant in this case.

Four women instigated this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq. Stephanie Ressel alleged that she was denied the position of courtroom security officer and that the position was given to a male whom the district court found less qualified than Ressel. The district court granted Ressel back pay but refused to award interest. Doris Scales was refused a job as a deputy allegedly because of her gender. Wanda Hylton, who also applied for a deputy position, claims that she was told by the sheriff that he would not consider hiring a woman as a deputy. Hylton was eventually hired a dispatcher, but in time left the

department. The other appellant, Kathy Sheppard, was according to the sheriff offered a position as a road deputy, which she refused. Sheriff Williams then made her civil process server, a promotion from her dispatcher position. After Sheriff Williams lost the next election, Sheriff Gregory abolished the position of civil process server. Sheppard argues that Gregory's action violated Title VII.

The district court did not reach the merits of most of the appellants' contentions, nor did it address the justifications proffered by the appellee. Instead, the district court concluded that several of the deputy sheriff positions fell within the "personal staff" exception to Title

VII.¹ The court concluded that a road deputy is a personal staff position because the deputy is the "alter-ego and personification of the sheriff in the geographical area to which he is assigned. . . . They are the eyes and ears of the sheriff, not only for matters which fall within their official sphere but also as to matters political." The court further held that this determination implied the finding that the investigator and supervisor positions are also within the personal staff, because those positions require experience as a road deputy.

¹In its first decision on this case, the district court held that all deputy sheriffs within Patrick County fell within the "personal staff" exemption to Title VII. This court, United States v. Gregory, 84-1613 (rth Cir Oct. 1, 1985), directed the district court to reconsider its decision in light of this court opinion in Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984).

It appears that certain appellants were also denied an opportunity to work as correctional officers in the county jail because of the sheriff's express policy to exclude female guards from the all-male jail. The district court found that a correctional officer is not a personal staff position, but that being a male is a bona fide occupational qualification for that position. The court reasoned that, because the jail houses male inmates only, and because some of the duties of the correctional officers require personal contact and unclothed circumstances with the inmates, a female officer could create embarrassment for both the officer and the inmates. Thus the district court found that the exclusion of females was made in furtherance of a bona fide occupational requirement.

Regarding the courtroom security position, the district court held that the personal staff exemption is not applicable, and that the sheriff discriminated against Ressel in filling that position. In calculating the amount of Ressel's back pay award, the court noted that she had been employed for three months during the period for which back pay was sought. The court found that although she worked for her husband without pay, she benefited indirectly. The court thus refused to grant Ressel interest on her back pay award.

Finally, the district court found that Sheriff Gregory's decision to abolish the position of process server was based on budgetary constraints, and was not a pretext for discrimination. The district court also refused to grant

the United States prospective relief, reasoning that the only victim of discrimination, Ressel, did not want a job with the department, and that in any event, the present sheriff had not engaged in any act of discrimination.

II.

Title VII defines the term "employee" as:

. . . an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office . . .

42 U.S.C. Section 2000e(f).

This court has twice interpreted the scope of the "personal staff" exception to the coverage of Title VII. In Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1984), the question presented was

whether the position of dispatcher/matron fell within the sheriff's personal staff. The court noted that the question was one of federal law, with state law relevant only insofar as it describes the plaintiff's position, including his duties and the manner in which he is hired, supervised, and fired.²

The court in Curl concluded that the plaintiff was not a member of the sheriff's personal staff. The opinion lists many reasons for the finding: (1) the plaintiff was not called upon to make policy for the sheriff's department, nor to act as an immediate

²The court stated that the fact that the employee served at the sheriff's pleasure was irrelevant to a Title VII claim, citing Lewis v. Blackburn, 734 F.2d 1000, 1004 (4th Cir. 1984), reversed on other grounds, 759 F.2d 1171 (4th Cir. 1985) (en banc), cert. denied, 106 S.Ct. 228.

advisor to the sheriff with respect to his constitutional or legal powers; (2) Congress intended for the exemption to be construed narrowly, to apply only to those individuals who are in highly intimate and sensitive positions of responsibility on the staff of the elected official; (3) the plaintiff's position was created and compensated by the county pursuant to state law; (4) her working relationship with the sheriff was never "highly intimate and sensitive;" (5) she did not occupy a high position with the chain of command, and her duties were primarily clerical and secretarial; and (6) she was not under the sheriff's personal direction. We were very careful to note that the decision in Curl did not create a per se rule for deputies, because the personal staff exception requires a careful

examination of the nature and circumstances of each case.

In Brewster v. Barnes, 788 F.2d 985 (4th Circ. 1986), the issue presented was whether the position of corrections officer fell within the personal staff exemption. We held that it did not, based on an inquiry into the nature and circumstances of the plaintiff's role in the sheriff's department. The focus of this inquiry was on the time period in which the plaintiff had been a corrections officer, and did not include the substance of any prior relationship between the officer and the sheriff. We concluded that the close relationship which had formerly existed had ended once the plaintiff assumed the position at the jail. Thus, because the plaintiff did not occupy an intimate or

high level position, and because she did not render advise in formulating policy decisions, she was not a member of the sheriff's personal staff.

Based on our examination of the multiple features of the relationship between the sheriff of Patrick County and his deputies, we cannot say as a matter of law that the deputy positions falls within the personal staff exception to the coverage of Title VII. The road deputies in Patrick County function primarily as typical policemen who administer the laws and the "policies" of their superiors. There is no evidence that the road deputies are called upon to render advice to the sheriff respecting his policy decisions or the proper exercise of his powers. The road deputy position in Patrick County is not one high within the chain

of command, nor do these road deputies occupy a highly intimate and sensitive status vis-a-vis the sheriff. The fact that Patrick County is rural and concomitantly employs a rather small police staff does not by itself render the position of road deputy with the sheriff's personal staff. Although we could assume that, with a small deputy contingent, the relationship between the deputies and the sheriff might be close, the appellee has simply failed to show that the closeness has engendered a highly intimate relationship which influences the making of policy.

We therefore reverse the district court's conclusion that the road deputy position fell within the personal staff exception to Title VII. The appellants are entitled to pursue their remedies under Title VII, and we remand to the

district court for further proceedings on the merits of the appellants' claims.³

III.

Sections 703(e) of Title VII permits gender-based discrimination when gender "is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." The Supreme Court in Dothard v. Rawlinson, 433 U.S. 321 (1977), held that maleness was a BFOQ in a particularly inhospitable penitentiary, characterized by rampant violence and

³Because the appellants only applied for the position of road deputy, and because they could not have applied for the positions of supervisor and investigator, as those higher positions required significant experience, we decline to decide whether the positions of investigator and supervisor fall within the personal staff exception to Title VII.

containing many sex offenders. The position for which the plaintiff in that case had applied was a "contact" prison guard: one who would work in continual close proximity to inmates. The court noted that the BFOQ exception was meant to be an extremely narrow exception to the general prohibition of gender discrimination.

Before a defendant prison can claim entitlement to the BFOQ exception to Title VII contained in Section 703(e), it must demonstrate why it cannot reasonably rearrange job responsibilities within the prison in order to minimize the clash between the privacy interests of the inmates and the safety of the prison employees on the one hand and non-discrimination requirement of Title VII on the other. Gunther v. Iowa State Men's Reformatory,

612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980). The burdon of proof is on the employer-defendant to establish a BFOQ, and it appears that the defendant below offered no evidence demonstrating why it could not accommodate, through the reasonable modification of the facility and job functions, female corrections officers. We therefore reverse.

IV.

Stephanie Ressel was refused the position of correctional officer in favor of a male whose objective qualifications were less. The district court found in favor of Ressel on her claim, but denied the award of interest on her back pay on the grounds that she had indirectly benefited by her employment with her husband's business.

A decision whether to award

prejudgment interest as a component of relief is entrusted to the discretion of the district court. Albemarle Paper Company v. Moody, 422 U.S. 405 (1975). Appellant argues that the proper remedy for this indirect benefiting from Ressel's employment during the interim between the sheriff's rejection of her for the position and the date of trial is to deduct the value of her services to her husband from the back pay award and then to provide interest on the reduced award. Although the district court could certainly have employed this alternative method, we do not find its decision to refuse the award of interest to be an abuse of discretion.

The appellee argues that the district court's decision to award back pay to Ressel constitutes an abuse of discretion, because the award of full

back pay violates the "make whole" philosophy of Title VII and imposes a punitive sanction as well as a remedial sanction upon appellee. This decision is also within the discretion of the trial court, Albermarle Paper Company, supra, and the appellee has simply presented no persuasive argument that the district court abused that discretion.

Finally, the appellee argues that the finding of the district court in favor of Ressel on this claim was not supported by the evidence. The district court, after finding that Ressel had established a prima facie case, apparently decided that the sheriff had failed to articulate properly a justification (a "factor other than sex") for the alleged discriminatory action, which articulation would have

required the plaintiff to establish that the reason provided by the defendant was a mere pretext for unlawful gender discrimination. The court's findings of fact are protected by Fed. R. Civ. P. 52(a), and the appellee has offered no cogent argument that the district court's findings and conclusions are clearly erroneous.

V.

The parties have presented a host of other issues which, in light of our resolution of the issues above, we can treat in summary fashion. First, the appellant argues that the district court erred in denying prospective relief. The appellant desires a permanent injunction and a mandated recruitment program. Because we have remanded the primary issues in this case to the district court for further proceedings,

the district court will be able to decide after such proceedings and findings of fact whether prospective relief is appropriate, and in what form. We also decline to address the appellee's argument that the appellant's claim for injunctive relief is moot. That issue is not ripe for appeal until the district court determines the appropriateness vel non of remedial measures.

Next, the appellee argues that the extension of Title VII to cover states and state officers violates the Tenth Amendment. Specifically, appellee argues that Congress acted unconstitutionally when it extended the definition of "employer" to include state and local governments. Appellee cites the decision in Equal Employment Opportunity Commission v. Wyoming, 460

U.S. 226 (1983), which held (by a vote of 4 - 1 - 4) that the extension of the Age Discrimination in Employment Act (ADEA) to the states was a legitimate exercise of Congressional power pursuant to the commerce clause.

The court in Wyoming, supra, held that Congress' application of the ADEA to the states was permissible despite the Tenth Amendment limitations outlined in National League of Cities v. Usery, 426 U.S. 833 (1976). Since the Wyoming decision, the Supreme Court has issued its opinion in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), which expressly overruled National League of Cities, thus effectively abolishing the limitations on the reach of the commerce clause contained in National League of Cities. See Garcia, the Seventeenth Amendment,